

**13-43-101. Title.**

This chapter is known as the "Property Rights Ombudsman Act."

Enacted by Chapter 258, 2006 General Session

**13-43-102. Definitions.**

As used in this chapter:

(1) "Constitutional taking" or "taking" means a governmental action resulting in a taking of real property that requires compensation to the owner of the property under:

(a) the Fifth or Fourteenth Amendment of the Constitution of the United States;

or

(b) Utah Constitution Article I, Section 22.

(2) "Takings and eminent domain law" means the provisions of the federal and state constitutions, the case law interpreting those provisions, and any relevant statutory provisions that:

(a) involve constitutional issues arising from the use or ownership of real property;

(b) require a governmental unit to compensate a real property owner for a constitutional taking; or

(c) provide for relocation assistance to those persons who are displaced by the use of eminent domain.

Enacted by Chapter 258, 2006 General Session

**13-43-201. Office of the Property Rights Ombudsman.**

(1) There is created an Office of the Property Rights Ombudsman in the Department of Commerce.

(2) The executive director of the Department of Commerce, with the concurrence of the Land Use and Eminent Domain Advisory Board created in Section 13-43-202, shall appoint attorneys with background or expertise in takings, eminent domain, and land use law to fill legal positions within the Office of the Property Rights Ombudsman.

(3) A person appointed under this section is an exempt employee.

(4) An attorney appointed under this section is an at-will employee who may be terminated without cause by:

(a) the executive director of the Department of Commerce; or

(b) an action of the land Use and Eminent Domain Advisory Board.

Enacted by Chapter 258, 2006 General Session

**13-43-202. Land Use and Eminent Domain Advisory Board -- Appointment -- Compensation -- Duties.**

(1) There is created the Land Use and Eminent Domain Advisory Board, within the Office of the Property Rights Ombudsman, consisting of the following seven members:

(a) one individual representing special service districts, nominated by the Utah

Association of Special Districts;

(b) one individual representing municipal government, nominated by the Utah League of Cities and Towns;

(c) one individual representing county government, nominated by the Utah Association of Counties;

(d) one individual representing the residential construction industry, nominated by the Utah Home Builders Association;

(e) one individual representing the real estate industry, nominated by the Utah Association of Realtors;

(f) one individual representing the land development community, jointly nominated by the Utah Association of Realtors and the Home Builders Association of Utah; and

(g) one individual who:

(i) is a citizen with experience in land use issues;

(ii) does not hold public office; and

(iii) is not currently employed, nor has been employed in the previous 12 months, by any of the entities or industries listed in Subsections (1)(a) through (f).

(2) After receiving nominations, the governor shall appoint members to the board.

(3) The term of office of each member is four years, except that the governor shall appoint three of the members of the board to an initial two-year term.

(4) Each mid-term vacancy shall be filled for the unexpired term in the same manner as an appointment under Subsections (1) and (2).

(5) (a) Board members shall elect a chair from their number and establish rules for the organization and operation of the board.

(b) Five members of the board constitute a quorum for the conduct of the board's business.

(c) The affirmative vote of five members is required to constitute the decision of the board on any matter.

(6) A member may not receive compensation or benefits for the member's service, but may receive per diem and travel expenses in accordance with:

(a) Section 63A-3-106;

(b) Section 63A-3-107; and

(c) rules made by the Division of Finance pursuant to Sections 63A-3-106 and 63A-3-107.

(7) A member need not give a bond for the performance of official duties.

(8) The Office of the Property Rights Ombudsman shall provide staff to the board.

(9) The board shall:

(a) receive reports from the Office of the Property Rights Ombudsman that are requested by the board;

(b) establish rules of conduct and performance for the Office of the Property Rights Ombudsman;

(c) receive donations or contributions from any source for the Office of the Property Rights Ombudsman's benefit;

(d) subject to any restriction placed on a donation or contribution received under

Subsection (9)(c), authorize the expenditure of donations or contributions for the Office of the Property Rights Ombudsman's benefit;

(e) receive budget recommendations from the Office of the Property Rights Ombudsman; and

(f) revise budget recommendations received under Subsection (9)(e).

(10) The board shall maintain a resource list of qualified arbitrators and mediators who may be appointed under Section 13-43-204 and qualified persons who may be appointed to render advisory opinions under Section 13-43-205.

Amended by Chapter 286, 2010 General Session

**13-43-203. Office of the Property Rights Ombudsman -- Duties.**

(1) (a) The Office of the Property Rights Ombudsman shall:

(i) develop and maintain expertise in and understanding of takings, eminent domain, and land use law;

(ii) clearly identify the specific information that is prepared for distribution to property owners whose land is being acquired under the provisions of Section 78B-6-505;

(iii) assist state agencies and local governments in developing the guidelines required by Title 63L, Chapter 4, Constitutional Taking Issues;

(iv) at the request of a state agency or local government, assist the state agency or local government, in analyzing actions with potential takings implications or other land use issues;

(v) advise real property owners who:

(A) have a legitimate potential or actual takings claim against a state or local government entity or have questions about takings, eminent domain, and land use law; or

(B) own a parcel of property that is landlocked, as to the owner's rights and options with respect to obtaining access to a public street;

(vi) identify state or local government actions that have potential takings implications and, if appropriate, advise those state or local government entities about those implications; and

(vii) provide information to private citizens, civic groups, government entities, and other interested parties about takings, eminent domain, and land use law and their rights, including a right to just compensation, and responsibilities under the takings, eminent domain, or land use laws through seminars and publications, and by other appropriate means.

(b) The Office of the Property Rights Ombudsman shall:

(i) provide the information described in Section 78B-6-505 on its website in a form that is easily accessible; and

(ii) ensure that the information is current.

(2) The Office of the Property Rights Ombudsman may not represent private property owners, state agencies, or local governments in court or in adjudicative proceedings under Title 63G, Chapter 4, Administrative Procedures Act.

(3) No member of the Office of the Property Rights Ombudsman nor a neutral third party rendering an advisory opinion under Section 13-43-205 or 13-43-206, may

be compelled to testify in a civil action filed concerning the subject matter of any review, mediation, or arbitration by, or arranged through, the office.

(4) (a) Except as provided in Subsection (4)(b), evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action.

(b) Subsection (4)(a) does not apply to:

- (i) actions brought under authority of Title 78A, Chapter 8, Small Claims Courts;
- (ii) a judicial confirmation or review of the arbitration itself as authorized in Title 78B, Chapter 11, Utah Uniform Arbitration Act;
- (iii) actions for de novo review of an arbitration award or issue brought under the authority of Subsection 13-43-204(3)(a)(i); or
- (iv) advisory opinions provided for in Sections 13-43-205 and 13-43-206.

Amended by Chapter 327, 2013 General Session

**13-43-204. Office of the Property Rights Ombudsman -- Arbitration or mediation of disputes.**

(1) If requested by the private property owner and if otherwise appropriate, the Office of the Property Rights Ombudsman shall mediate, or conduct or arrange arbitration for, a dispute between the owner and a government entity or other type of condemning entity:

- (a) involving taking or eminent domain issues;
- (b) involved in an action for eminent domain under Title 78B, Chapter 6, Part 5, Eminent Domain; or
- (c) involving relocation assistance under Title 57, Chapter 12, Utah Relocation Assistance Act.

(2) If arbitration or mediation is requested by a private property owner under this section, Section 57-12-14 or 78B-6-522, and arranged by the Office of the Property Rights Ombudsman, the government entity or condemning entity shall participate in the mediation or arbitration as if the matter were ordered to mediation or arbitration by a court.

(3) (a) (i) In conducting or arranging for arbitration under Subsection (1), the Office of the Property Rights Ombudsman shall follow the procedures and requirements of Title 78B, Chapter 11, Utah Uniform Arbitration Act.

(ii) In applying Title 78B, Chapter 11, Utah Uniform Arbitration Act, the arbitrator and parties shall treat the matter as if:

- (A) it were ordered to arbitration by a court; and
- (B) the Office of the Property Rights Ombudsman or other arbitrator chosen as provided for in this section was appointed as arbitrator by the court.

(iii) For the purpose of an arbitration conducted under this section, if the dispute to be arbitrated is not already the subject of legal action, the district court having jurisdiction over the county where the private property involved in the dispute is located is the court referred to in Title 78B, Chapter 11, Utah Uniform Arbitration Act.

(iv) An arbitration award under this chapter may not be vacated under the provisions of Subsection 78B-11-124(1)(e) because of the lack of an arbitration

agreement between the parties.

(b) The Office of the Property Rights Ombudsman shall issue a written statement declining to mediate, arbitrate, or to appoint an arbitrator when, in the opinion of the Office of the Property Rights Ombudsman:

- (i) the issues are not ripe for review;
- (ii) assuming the alleged facts are true, no cause of action exists under United States or Utah law;
- (iii) all issues raised are beyond the scope of the Office of the Property Rights Ombudsman's statutory duty to review; or
- (iv) the mediation or arbitration is otherwise not appropriate.

(c) (i) The Office of the Property Rights Ombudsman shall appoint another person to arbitrate a dispute when:

(A) either party objects to the Office of the Property Rights Ombudsman serving as the arbitrator and agrees to pay for the services of another arbitrator;

(B) the Office of the Property Rights Ombudsman declines to arbitrate the dispute for a reason other than those stated in Subsection (3)(b) and one or both parties are willing to pay for the services of another arbitrator; or

(C) the Office of the Property Rights Ombudsman determines that it is appropriate to appoint another person to arbitrate the dispute with no charge to the parties for the services of the appointed arbitrator.

(ii) In appointing another person to arbitrate a dispute, the Office of the Property Rights Ombudsman shall appoint an arbitrator who is agreeable to:

- (A) both parties; or
- (B) the Office of the Property Rights Ombudsman and the party paying for the arbitrator.

(iii) The Office of the Property Rights Ombudsman may, on its own initiative or upon agreement of both parties, appoint a panel of arbitrators to conduct the arbitration.

(iv) The Department of Commerce may pay an arbitrator per diem and reimburse expenses incurred in the performance of the arbitrator's duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

(d) In arbitrating a dispute, the arbitrator shall apply the relevant statutes, case law, regulations, and rules of Utah and the United States in conducting the arbitration and in determining the award.

(e) The property owner and government entity, or other condemning entity, may agree in advance of arbitration that the arbitration is binding and that no de novo review may occur.

(f) Arbitration by or through the Office of the Property Rights Ombudsman is not necessary before bringing legal action to adjudicate any claim.

(g) The lack of arbitration by or through the Office of the Property Rights Ombudsman does not constitute, and may not be interpreted as constituting, a failure to exhaust available administrative remedies or as a bar to bringing legal action.

(h) Arbitration under this section is not subject to Title 63G, Chapter 4, Administrative Procedures Act, or Title 78B, Chapter 6, Part 2, Alternative Dispute Resolution Act.

(i) Within 30 days after an arbitrator issues a final award, and except as provided in Subsection (3)(e), any party to the arbitration may submit the dispute, the

award, or any issue upon which the award is based, to the district court for review by trial de novo.

(4) The filing with the Office of the Property Rights Ombudsman of a request for mediation or arbitration of a constitutional taking issue does not stay:

- (a) a county or municipal land use decision;
- (b) a land use appeal authority decision; or
- (c) the occupancy of the property.

(5) A member of the Office of the Property Rights Ombudsman, or an arbitrator appointed by the office, may not be compelled to testify in a civil action filed concerning the subject matter of any review, mediation, or arbitration by the Office of the Property Rights Ombudsman.

Amended by Chapter 59, 2014 General Session

**13-43-205. Advisory opinion.**

(1) A local government, private entity, or a potentially aggrieved person may, in accordance with Section 13-43-206, request a written advisory opinion:

- (a) from a neutral third party to determine compliance with:
  - (i) Section 10-9a-505.5 and Sections 10-9a-507 through 10-9a-511;
  - (ii) Section 17-27a-505.5 and Sections 17-27a-506 through 17-27a-510; and
  - (iii) Title 11, Chapter 36a, Impact Fees Act; and
- (b) at any time before:

(i) a final decision on a land use application by a local appeal authority under Title 11, Chapter 36a, Impact Fees Act, or Section 10-9a-708 or 17-27a-708;

(ii) the deadline for filing an appeal with the district court under Title 11, Chapter 36a, Impact Fees Act, or Section 10-9a-801 or 17-27a-801, if no local appeal authority is designated to hear the issue that is the subject of the request for an advisory opinion; or

(iii) the enactment of an impact fee, if the request for an advisory opinion is a request to review and comment on a proposed impact fee facilities plan or a proposed impact fee analysis as defined in Section 11-36a-102.

(2) A private property owner may, in accordance with Section 13-43-206, request a written advisory opinion from a neutral third party to determine if a condemning entity:

- (a) is in occupancy of the owner's property;
- (b) is occupying the property:
  - (i) for a public use authorized by law; and
  - (ii) without colorable legal or equitable authority; and
- (c) continues to occupy the property without the owner's consent, the occupancy would constitute a taking of private property for a public use without just compensation.

(3) An advisory opinion issued under Subsection (2) may justify an award of attorney fees against a condemning entity in accordance with Section 13-43-206 only if the court finds that the condemning entity:

- (a) does not have a colorable claim or defense for the entity's actions; and
- (b) continued occupancy without payment of just compensation and in disregard of the advisory opinion.

Amended by Chapter 59, 2014 General Session

**13-43-206. Advisory opinion -- Process.**

- (1) A request for an advisory opinion under Section 13-43-205 shall be:
  - (a) filed with the Office of the Property Rights Ombudsman; and
  - (b) accompanied by a filing fee of \$150.
- (2) The Office of the Property Rights Ombudsman may establish policies providing for partial fee waivers for a person who is financially unable to pay the entire fee.
- (3) A person requesting an advisory opinion need not exhaust administrative remedies, including remedies described under Section 10-9a-801 or 17-27a-801, before requesting an advisory opinion.
- (4) The Office of the Property Rights Ombudsman shall:
  - (a) deliver notice of the request to opposing parties indicated in the request;
  - (b) inquire of all parties if there are other necessary parties to the dispute; and
  - (c) deliver notice to all necessary parties.
- (5) If a governmental entity is an opposing party, the Office of the Property Rights Ombudsman shall deliver the request in the manner provided for in Section 63G-7-401.
- (6) (a) The Office of the Property Rights Ombudsman shall promptly determine if the parties can agree to a neutral third party to issue an advisory opinion.
  - (b) If no agreement can be reached within four business days after notice is delivered pursuant to Subsections (4) and (5), the Office of the Property Rights Ombudsman shall appoint a neutral third party to issue an advisory opinion.
- (7) All parties that are the subject of the request for advisory opinion shall:
  - (a) share equally in the cost of the advisory opinion; and
  - (b) provide financial assurance for payment that the neutral third party requires.
- (8) The neutral third party shall comply with the provisions of Section 78B-11-109, and shall promptly:
  - (a) seek a response from all necessary parties to the issues raised in the request for advisory opinion;
  - (b) investigate and consider all responses; and
  - (c) issue a written advisory opinion within 15 business days after the appointment of the neutral third party under Subsection (6)(b), unless:
    - (i) the parties agree to extend the deadline; or
    - (ii) the neutral third party determines that the matter is complex and requires additional time to render an opinion, which may not exceed 30 calendar days.
- (9) An advisory opinion shall include a statement of the facts and law supporting the opinion's conclusions.
- (10) (a) Copies of any advisory opinion issued by the Office of the Property Rights Ombudsman shall be delivered as soon as practicable to all necessary parties.
  - (b) A copy of the advisory opinion shall be delivered to the government entity in the manner provided for in Section 63G-7-401.
- (11) An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to, nor admissible as evidence in, a dispute

involving land use law except as provided in Subsection (12).

(12) (a) Subject to Subsection (12)(d), if the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion:

(i) the substantially prevailing party on that cause of action:

(A) may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution; and

(B) shall be refunded an impact fee held to be in violation of Title 11, Chapter 36a, Impact Fees Act, based on the difference between the impact fee paid and what the impact fee should have been if the government entity had correctly calculated the impact fee; and

(ii) in accordance with Subsection (12)(b), a government entity shall refund an impact fee held to be in violation of Title 11, Chapter 36a, Impact Fees Act, to the person who was in record title of the property on the day on which the impact fee for the property was paid if:

(A) the impact fee was paid on or after the day on which the advisory opinion on the impact fee was issued but before the day on which the final court ruling on the impact fee is issued; and

(B) the person described in Subsection (12)(a)(ii) requests the impact fee refund from the government entity within 30 days after the day on which the court issued the final ruling on the impact fee.

(b) A government entity subject to Subsection (12)(a)(ii) shall refund the impact fee based on the difference between the impact fee paid and what the impact fee should have been if the government entity had correctly calculated the impact fee.

(c) Nothing in this Subsection (12) is intended to create any new cause of action under land use law.

(d) Subsection (12)(a) does not apply unless the resolution described in Subsection (12)(a) is final.

(13) Unless filed by the local government, a request for an advisory opinion under Section 13-43-205 does not stay the progress of a land use application, the effect of a land use decision, or the condemning entity's occupancy of a property.

Amended by Chapter 59, 2014 General Session